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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BYRON MATEO, Defendant and Appellant.	B266900 (Los Angeles County Super. Ct. No. BA432648)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed as modified.

Elana Goldstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Byron Mateo was charged by information with three counts: (1) assault with a deadly weapon (Pen. Code, § 245, subd.

(a)(1)),[1] (2) injuring a spouse, cohabitant, boyfriend, girlfriend, or child's parent within seven years of a previous conviction under section 243 (§ 273.5, subd. (f)(2)), and (3) making criminal threats (§ 422, subd. (a)). A jury convicted him of counts 2 and 3. Appellant contends that the trial court abused its discretion in denying his motion to reopen the evidence and that the court erred in assessing a $500 domestic violence fee. We order that the domestic violence fee be stricken and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Evidence*

A. *Current Offense*

Around 12:30 a.m. on January 1, 2015, Garnet R. attended a New Year's Eve gathering with appellant (her boyfriend of approximately seven years) and their infant daughter. When appellant wanted to leave, he asked Garnet for the keys to her car but she refused because he was drunk. Appellant became upset and left, but Garnet could not find him when she went outside. Garnet was worried about appellant, so she went with her daughter, appellant's brother, and Garnet's friend Selma Casillas to look for him.

Garnet took appellant's brother home and was going to take Casillas home, but appellant called Garnet and told her to pick him up at his former residence. Appellant told Garnet not to bring Casillas, but Garnet refused, explaining that Casillas already was in the car with her.

When Garnet picked up appellant, he got into the car and suddenly punched Garnet in the head. Casillas began arguing with appellant, who told

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[1] Further unspecified statutory references are to the Penal Code.

Garnet, "fuck you bitch. You're a whore. You deserve it." Appellant got out of the car and walked away.

After Garnet took Casillas home, appellant called Garnet and again asked her to pick him up. When Garnet arrived, appellant threw brass knuckles at her car, denting the car. Garnet feared for her daughter's safety, so she drove away without appellant, went to the home she shared with appellant, and fell asleep.

Garnet was awakened around 8:00 a.m. on January 1 when appellant began hitting her with his fist and his brass knuckles. Appellant was yelling that he was going to kill Garnet and that she deserved it and that he wanted her car keys. Appellant said, "You're done. You're done. I'm gonna get you." Appellant continued hitting and choking Garnet.

Garnet got away and grabbed her cell phone to call 911, but appellant took the phone from her and broke it. Garnet ran out the door to her neighbor's house. Appellant began walking toward the neighbor's house, telling Garnet, "You're gonna make a scene. I'm gonna kill you. You're done. You're done. Watch. Watch what I do." Garnet knocked on the neighbor's door, but no one answered. Appellant could not see the door, so Garnet pretended someone answered and asked to borrow the phone. Appellant was "shocked" and went back toward his house.

Garnet ran down the street, saw a woman getting into her car, and asked if she could borrow her phone. The woman dialed 911 for Garnet, who was shaking too badly to dial the phone. Garnet saw appellant drive away in her car.

When the police arrived, they took pictures of Garnet's injuries. Garnet's lip was bleeding, her face was swollen, and she had bruises on her arm and her leg. The bruise on her arm was from an incident a week or two

prior to January 2015, when appellant hit her and threw cold water on her. The bruise on her leg was from a previous incident when appellant hit her with a golf club. The police took Garnet and her daughter to Garnet's mother's house.

Garnet asked her sister-in-law, Eunice Aguilar, to help her find her car, which she needed for work and school. Aguilar picked up Garnet, and they drove to appellant's cousin's house, where they saw Garnet's car in the carport. Garnet stayed in the car and locked the doors while Aguilar approached the car.

Aguilar saw appellant sleeping in the car. She tapped on the window and told him to give her the car keys. Appellant gathered his belongings, gave Aguilar the keys, and got out of the car. When he saw Garnet in Aguilar's car, he put brass knuckles on his fist and punched a window in Garnet's car, shattering it. Aguilar began yelling at appellant, who yelled back and walked away. Aguilar called the police, but the police were unable to find appellant after searching for two hours.

B. *Prior Acts*

Garnet testified about three prior acts of violence by appellant and described them to Los Angeles Police Detective Victoria Mulder on January 2, 2015. First, in November 2011, appellant choked Garnet and took her credit cards. Second, in December 2011, appellant and Garnet were leaving a courthouse when appellant tripped Garnet, causing her to fall. Appellant then tried to hit her but was stopped by a passerby. The incident was captured on a surveillance video, and appellant was convicted of this offense. The third occurred in October 2014, when appellant hit Garnet in the leg with a golf club.

C. *Expert Testimony and Police Testimony*

Gail Pincus testified for the prosecution as an expert on domestic violence and intimate partner battery. She described the tactics abusers use and the thought process of victims to explain why victims stay in abusive relationships and often do not report the abuse.

Los Angeles Police Officer Alex Alas testified that he and his partner responded to both of Garnet's 911 calls on January 1, 2015. When they arrived at Garnet's residence, Garnet was crying and shaking, and she had a bloody lip, swollen face, and bruises on her arms. Garnet's bedroom was "ransacked" and showed evidence of a struggle. The officers did not find any brass knuckles in the home.

Detective Mulder interviewed Garnet on January 2, 2015. During the interview, Detective Mulder felt bumps on Garnet's head and took pictures of injuries on her head, leg, and arm.

II. *Defense Evidence*

Appellant waived his right to testify and did not present any evidence or assert an affirmative defense.

III. *Procedural Background*

The jury found appellant guilty of counts 2 and 3 and found true the allegation as to count 2 that he suffered a prior conviction for simple battery on a spouse or cohabitant. The court found that the jury was deadlocked as to count 1 and declared a mistrial as to that count. The court sentenced appellant to a term of 4 years and 8 months, dismissed count 1, and imposed a $500 domestic violence fine. Appellant timely appealed.

DISCUSSION

I. *Denial of Motion to Reopen*

Appellant contends that the trial court's denial of his motion to reopen the evidence violated his rights to testify and to due process. We conclude that the trial court did not abuse its discretion in denying the motion. We begin by discussing proceedings in the trial court that are relevant to our analysis.

A. *Pretrial Proceedings*

Before trial, the prosecution sought to introduce evidence under Evidence Code section 1109 of prior acts of domestic violence committed by appellant.[2] In addition to the three prior incidents to which Garnet testified, the prosecution sought to introduce evidence of an incident involving Natalie Cobain,[3] a woman with whom appellant had a relationship simultaneous to his relationship with Garnet. According to the prosecutor, in March 2014, Cobain called 911 to report that appellant knocked her to the ground and was threatening her with a golf club. The prosecutor argued that the evidence regarding Cobain was important because Garnet's credibility would be at issue at trial.

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[2] "'Evidence of prior criminal acts is ordinarily inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101.)'" (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232.) However, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1).)

[3] Cobain's name is spelled as "Cobain" and "Cobian" in the record. It is unclear which spelling is correct, so we will refer to her as "Cobain."

Although the court allowed the evidence regarding Garnet, it excluded the evidence regarding Cobain. The court reasoned that allowing the evidence would be "very time consuming" because if Cobain denied the incident, as victims of domestic violence often do, the prosecution would be required to impeach her.

During another evidentiary hearing, the prosecutor asked the court for permission to reopen the issue regarding Cobain if it became clear during trial that the defense tactic was to attack Garnet's credibility. The prosecutor argued that the alleged violence against Cobain would become more relevant because it would bolster Garnet's testimony. He also stated that he would need to recall Detective Mulder to verify the incident with Cobain.

B. *Appellant's Waiver of His Right to Testify and Motion to Reopen*

After the prosecution completed its case-in-chief, the trial court asked if appellant was going to testify. Defense counsel replied, "He is going to testify unless something comes up in the 402's." The court stated, "Let's do the 402's then he can make his final decision."

One of the evidentiary issues discussed by the parties was the alleged March 2014 incident of domestic violence against Cobain. The prosecutor stated that if appellant testified and called Garnet's credibility into question by denying the incidents of domestic violence, the prosecution would seek to introduce the evidence involving Cobain.

The court explained to defense counsel, "This is the risk you take if he testifies. If he testifies and denies incidents of domestic violence the details of which may match Miss Cobain's report with the golf club incident, I think that he could well open the door and I would allow her to testify. So that's a

risk he might take. He can open the door to all the other – to the other victim which I precluded under 352 but once he testifies he can deny certain incidents especially ones that match the type of behavior he entered into with Miss Cobain then I think it's admissible." After conferring with appellant, defense counsel told the court, "I spoke with my client about the risks. After speaking with my client . . . to avoid any issues . . . , he is advising me he does not wish to testify."

The court explained the right to testify to appellant and asked, "Is it your choice at this juncture to not testify?" Appellant replied, "yes, Your Honor." After appellant waived his right to testify, the court expressed the need to discuss the jury instructions because appellant's decision whether to testify affected the instructions. Both parties rested.

The court subsequently read the instructions to the jury. After the court finished instructing the jury, defense counsel stated that appellant was "changing his mind about testifying." The court responded that it was too late. Appellant stated, "I had time to think," but the court explained that the jury already had been instructed and that appellant "made [his] decision at the time with the appropriate waivers so now it's too late."

C. Analysis

"'A "motion to reopen [is] one addressed to the [trial] court's sound discretion." [Citation.] In determining whether an abuse of discretion occurred, the reviewing court considers four factors: '"(1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence."' [Citation.]' [Citation.]" (*People v. Masters*

(2016) 62 Cal.4th 1019, 1069 (*Masters*); *People v. Jones* (2003) 30 Cal.4th 1084, 1110.) Applying these factors, we conclude the trial court did not abuse its discretion in denying appellant's motion to reopen.

We first address appellant's argument that the trial court should have inquired into the content of his proposed testimony. We disagree because the trial court easily could have surmised the nature of appellant's proposed testimony. During opening and closing arguments, defense counsel conceded appellant was guilty of count 2, injuring Garnet, and challenged only the issues of the brass knuckles and the threat in counts 1 and 3. The only evidence regarding those counts was Garnet's testimony of what occurred during the January 1 attack in their house. The defense position thus was that Garnet was lying. Because Garnet's credibility regarding these allegations was the only issue, the only evidence appellant could have offered by testifying was to deny the allegations. In fact, appellant argues that the significance of his testimony would be to contradict Garnet's account of the January 1 attack because "he was the only other witness to the incident that occurred inside the house." We examine the four factors from *Masters* in this light.

The first factor, the stage in the proceedings when the motion was made, weighs against appellant. It is undisputed that appellant made the request after the court instructed the jury. (See *People v. Marshall* (1996) 13 Cal.4th 799, 836 ["no constitutional error or abuse of discretion in the trial court's refusal to permit defendant" to present more testimony after the evidence had closed and argument had begun]; *People v. Earley* (2004) 122 Cal.App.4th 542, 546 (*Earley*) [no abuse of discretion in the trial court's denial of the defendant's request to testify at trial, made after the defense had rested but before the jury was instructed].) Moreover, had appellant

testified and denied the incident with Garnet, the prosecutor would have sought to introduce the evidence regarding Cobain, and the trial court stated that it would allow it. This would have prolonged the trial by requiring the prosecution to call Cobain and Detective Mulder and play the 911 call. (See *Earley*, *supra*, 122 Cal.App.4th at p. 546 ["Had defendant been permitted to testify it would have prolonged the trial and may have required the prosecution to present rebuttal testimony from an expert who, in turn, would first have to conduct further testing."].)

The second factor, the defendant's diligence in presenting the new evidence, also weighs against appellant because he has offered no explanation for his late request to testify. "This is not a case where the defense, through no fault of its own, discovered highly relevant new evidence late in the proceedings." (*People v. Jones* (2012) 54 Cal.4th 1, 66; see also *ibid.* [no abuse of discretion where trial court denied defense counsel's request to reopen after resting its case because there was nothing to excuse the defense's failure to call the witness before resting]; *Masters*, *supra*, 62 Cal.4th at p. 1069 [no abuse of discretion where the evidence was available to the defendant "before the start of the trial or revealed during it"].) Instead, appellant wanted to testify to give his version of the January 1 incident, evidence that clearly was available to him during the trial. Thus, "the evidence was not even 'new' . . . ." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1521 (*Funes*).) The denial of a motion to reopen is not an abuse of discretion if "the evidence the defense sought to offer at reopening was indisputably available *during* the trial. . . . The trial court was entitled to rely on defendant's lack of diligence in denying the motion to reopen." (*People v. Monterroso* (2004) 34 Cal.4th 743, 779.)

The third factor, the prospect that the jury would accord the new evidence undue emphasis, weighs neither against nor in favor of appellant.

The fourth factor, the significance of the evidence, weighs against appellant. Appellant's denial that he used brass knuckles and threatened Garnet during the undisputed attack on her is "not so significant that we may conclude the trial court abused its broad discretion by declining to reopen the case" after giving the jury instructions. (*Masters*, *supra*, 62 Cal.4th at p. 1069.) Not only did Garnet testify about appellant's threats, but Aguilar testified that Garnet told her appellant had threatened her. In light of all the other evidence that was presented, appellant's denial that he threatened Garnet is "far from critical." (*Funes*, *supra*, 23 Cal.App.4th at p. 1521.)

"The motion came too late in the proceedings and did not propose to offer any new, particularly significant, evidence." (*Earley*, *supra*, 122 Cal.App.4th at p. 546.) After considering the four factors, we conclude the trial court did not abuse its discretion in denying appellant's motion to reopen evidence.

II. *Domestic Violence Fine*

Appellant correctly contends, and respondent concedes, that the trial court erred in ordering appellant to pay a $500 domestic violence fee under section 1203.097, subdivision (a)(5)(A). The $500 domestic violence fee is to be imposed only when a defendant is "granted probation." (§ 1203.097, subd. (a)(5)(A).) Because defendant was sentenced to prison, the fee was unauthorized. (See *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1520 [striking the fee where the defendant was sentenced to prison].)

DISPOSITION

The $500 domestic violence fee is stricken. As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.